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November 7, 2013

Ms. Jocelyn Boyd
Chief Clerk and Administrator
South Carolina Public Service Commission
Synergy Business Park, The Saluda Building
101 Executive Center Drive
Columbia, South Carolina 29210

Re: South Carolina Telephone Coalition Petition to Modify Alternative
Regulation Plans Filed Pursuant to S. C. Code Ann. § 58-9-576(B) to
Take Into Account Recent Action by the Federal Communications
Commission
Docket No. 2013-55-C

Dear Ms. Boyd:

Enclosed for filing on behalf of the South Carolina Telephone Coalition (SCTC) please find SCTC's Response To The Request Of The S. C. Cable Television Association For The Commission To Take Judicial Notice of Certain Filings in the above-referenced matter. By copy of this letter and Certificate of Service a copy of this Response has been mailed to all parties of record.

Thank you for your assistance.

Very truly yours,

McNAIR LAW FIRM, P. A.,


Margaret M. Fox

MMF:rwm
Enclosure

cc: Parties of Record

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Docket No. 2013-55-C

**SOUTH CAROLINA TELEPHONE COALITION'S RESPONSE TO THE REQUEST OF
THE SOUTH CAROLINA CABLE TELEVISION ASSOCIATION FOR THE
COMMISSION TO TAKE JUDICIAL NOTICE OF CERTAIN FILINGS**

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A. SCCTA's Request is Untimely

SCCTA's request should be denied because it is untimely. Commission Rule 103-846(C) provides that the Commission may take notice of judicially cognizable facts or generally recognized technical or scientific facts within the agency's specialized knowledge, but requires that parties be notified *either before or during the hearing*. The Commission has previously cited this requirement as the basis for denying a request for judicial notice of public Charleston County property tax records. See Order No. 2012-86 in Docket No. 2011-317-WS ("With regard to taking judicial notice, our regulations specifically require that any such material be made available before or during the hearing. The Property Owners Group failed to do so; therefore, judicial notice at this juncture would be improper.").

B. The Requested Documents are Not Relevant

The SCCTA contends the documents filed with ORS on May 3, 2013, in NDI 2013-6-C are "highly relevant to the matters being considered in this docket." (Request, p. 1.) SCTC disagrees the documents are in any way relevant to the instant docket. In its Request, SCCTA lists places in the transcript of the September 11, 2013 oral argument where the documents were referenced and asserts the RLECs "directly relied" upon the documents and that the documents were the subject of an "extensive discussion" at the oral argument. (Request, p. 2.) A review of the transcript references cited by SCCTA in its Request reveals this assertion to be false. In discussing the *background* of the State USF, SCTC's counsel merely made reference to the fact that the ILECs file reports on an annual basis with ORS. See Tr. at p. 48, lines 5-15. Additionally, *in response to a question from a Commissioner* about the ability of ORS to request the filing of cost studies, SCTC's counsel acknowledged that the companies had recently done so in response to a concern expressed by ORS. See Tr. at p. 61, line 20 through p. 62, line

3. However, SCTC's counsel noted that the cost studies were not *required* to be filed (Tr. at p. 62, lines 19-22), and that the cost studies were not relevant to the instant proceeding. See Tr. at p. 62, lines 10-11 ("... this is not part of this proceeding, but I want to respond to your question."). The remaining citations relied upon by SCCTA are statements by its own counsel or counsel for Sprint, which supported SCCTA's position in the oral argument. See Request at p. 2, *citing* Tr. at p. 76, line 23 through p. 80, line 12; Tr at p. 82, line 10 through p. 84, line 25; Tr, at p. 83, line 22 through p. 84, line 12.

Additionally, the same or similar documents were the subject of a discovery request by SCCTA *over 7 months ago*. See Motion of South Carolina Cable Television Association for Production of Certain USF Records, dated March 22, 2013 (the "Discovery"). SCTC filed a response to the Discovery, contesting the relevance of the documents to the instant proceeding. See SCTC Response, dated April 1, 2013, at p. 3 (arguing that, while the [blank] forms themselves may be relevant to an understanding of what information carriers of last resort file and how the process works, individual company data will not aid in this understanding and is not relevant to the proceeding). The parties later agreed that only certain documents – specifically, the last three years of annual USF data filings for the six companies named in the SCCTA Motion to Reduce State USF that is the basis of the instant proceeding¹ – would be produced, subject to a Protective Order agreed upon by the parties in this docket. See Protective Order dated August 6, 2013. It is interesting to note that SCCTA's counsel made no reference in his oral argument to the data that was actually produced. SCTC continues to assert that the documents that were produced, as well as the additional documents SCCTA now seeks to have judicially noticed, are simply not relevant to this proceeding.

¹ The companies are Chester Telephone Company; Home Telephone ILEC, LLC d/b/a Home Telecom; Lockhart Telephone Company; PBT Telecom, Inc.; Ridgeway Telephone Company; and West Carolina Telephone Cooperative, Inc.

C. Judicial Notice Is Not Appropriate

The documents requested do not appear to be the type of documents that are appropriate for judicial notice. Judicial notice is appropriate when a fact is of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability. Masters v. Rodgers Dev. Grp., 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984). “‘Judicial notice’ takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge.” Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976).

It is unclear to us why SCCTA is asking the Commission to take judicial notice of certain information filed in the NDI, consisting of data and surrogate cost information. SCCTA seems to be asking the Commission to take judicial notice of the information, while at the same time disagreeing that the factual information contained therein is of common or general knowledge. See Tr. at p. 83 (SCCTA’s counsel states that the companies’ costs are “very much contested”). SCCTA cannot have it both ways – *i.e.*, take judicial notice but contest the information. See 31A C.J.S. Evidence § 14 (“Courts do not take judicial notice of a fact that might be disputed by competent evidence.”). Such a position is inconsistent not only with the law, but with the Commission’s own practice regarding the taking of judicial notice of facts that are of common or general knowledge. See, e.g., Order No. 2001-070 in Docket No. 2000-253-T, at p. 7 fn. 4 (Commission took judicial notice of U.S. Census Bureau information regarding increases in population and residential construction permits to support a finding of the need for residential moving services); Order No. 2000-839 in Docket No. 2000-005-G (Commission took judicial notice of prior Commission Orders in the docket files of the Commission as evidence of a gas

utility's business and legal status, noting that the finding of fact was "essentially informational, procedural, and jurisdictional in nature, and the matters which it involves are uncontested").

SCCTA's Request is not like prior requests addressed by the Commission, in that it does not appear to relate to uncontested facts. However, if it is SCCTA's intention to have the materials judicially noticed *and deemed to be uncontested, established facts*, SCTC has no objection to that. If, on the other hand, SCCTA is seeking to introduce contested matters into the record of a non-evidentiary proceeding through judicial notice, that is improper and the Request should be denied. See Masters v. Rodgers Dev. Grp., 283 S.C. 251, 257, 321 S.E.2d 194, 197 (Ct. App. 1984) ("We think it particularly inappropriate to allow Stevenson to introduce evidence through the back door of judicial notice, when he has conceded the factual allegations of the complaint by default and those allegations entitle Masters to relief.").

D. SCCTA Should Not Be Permitted to Circumvent the Discovery Process

As discussed above, much of this information was the subject of an earlier discovery request by SCCTA that resulted in an agreement between the parties that SCTC would produce certain information. To the extent SCCTA is now seeking discovery of information that was excluded from production through the "back door," that is inappropriate and should be denied. Discovery in this case has already been completed, the oral argument has been held, and briefs and proposed orders are scheduled to be filed in approximately 2 weeks. SCCTA cannot use judicial notice as an end-run around the discovery process at this late stage of the proceedings.

Again, SCTC has no objection to the Commission reviewing the documents at issue at the appropriate time and in the appropriate context, as they are part of the Commission's files. SCTC's sole objection relates to the timeliness and propriety of judicial notice with respect to the requested documents, as well as any use by SCCTA of judicial notice to circumvent the

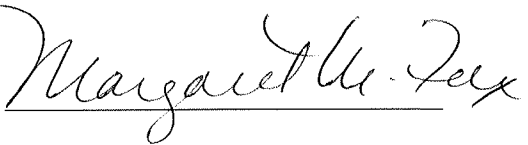
discovery process and limitations. Therefore, SCTC suggests the documents need not, and indeed should not, be made part of the record in this case.

Conclusion

To summarize, the Commission should deny SCCTA's request because (1) SCCTA did not notify the parties either before or during the hearing, as required by Commission Rule 103-846(C) and, therefore the request is untimely; (2) the information is not relevant to this proceeding; and/or (3) the information is not judicially cognizable information because SCCTA apparently disputes the information. If the Commission does take judicial notice of this information, it should do so only upon a finding that the information is not subject to dispute but is taken as established fact, consistent with the law and Commission precedent. Additionally, the Commission should not allow a party to use judicial notice to obtain discovery of information at this late stage of the proceedings. Discovery was conducted and concluded after the Hearing Officer issued a Protective Order in this proceeding over 3 months ago. To the extent SCCTA is now seeking discovery of information that was excluded from production, that is inappropriate and should be denied.

Respectfully submitted,

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By: 

Attorneys for South Carolina Telephone
Coalition

November 7, 2013
Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2013 - 55 - C

In Re: South Carolina Telephone Coalition Petition)
 To Modify Alternative Regulation Plans Filed)
 Pursuant to S.C. Code Ann. § 58-9-576(B) to)
 Take Into Account Recent Action by the Federal)
 Communications Commission)
_____)

**CERTIFICATE
OF SERVICE**

I, Rebecca W. Martin, do hereby certify that I have this date served one (1) copy of the **S. C. Telephone Coalition's Response To The Request Of The S. C. Cable Television Association For The Commission To Take Judicial Notice Of Certain Filings** in the above-referenced docket upon the following parties causing said copies to be deposited with the United States Postal Service, first class postage prepaid and properly affixed thereto, and addressed as follows:

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